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No. 87-187

IN THE

Supreme Court of the United States

October Term, 1987

CYNTHIA GRANTHAM WRIGHT,

Petitioner,

against

PETER J. CAYAN, Individually and as President of the State University of New York College of Technology,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Respondent in Opposition

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Dated: August 26, 1987

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Question Presented

Whether, with respect to the particular facts here involved, petitioner's employment was, as a matter of New York law, terminable at will so that it could be terminated without a hearing or a showing of cause.

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BRIEF FOR RESPONDENT IN OPPOSITION

Decisions Below

The opinion of the Second Circuit sought to be reviewed is reported at 817 F2d 999 (2d Cir 1987).[1] It affirmed a judgment of the District Court for the Northern District of New York reported at 642 F Supp 947 (NDNY 1986).

Preliminary Statement

In this proceeding for damages and injunctive relief pursuant to 42 USC § 1983, petitioner seeks review of the Court of Appeals' affirmance of the District Court's grant of summary judgment dismissing the complaint that she was deprived of a property interest in continued employment.

Statement of the Case

The undisputed facts, as found by the court below, are as follows. Petitioner was hired by Dr. William Kunsela, the then president of the State University of New York College at Utica/Rome, as "Secretary to the President", a classified position exempt from civil service hiring and firing rules, meaning that she was an employee terminable at will (App A, p 3). Petitioner commenced employment on April 16, 1973. Four months later she received a letter confirming her employment as an exempt employee and listing conditions of her employment, which included a statement that petitioner "serves at the pleasure of the supervisor for the first two (2) years" (App A, p 3). Approximately three months after that she received another letter

[1]The decision annexed to the petition as Appendix A contains footnote number 3 (App A, pp 6-9) which was deleted from the published decision at 817 F2d 999 (2d Cir 1987) in response to respondent's request and with petitioner's consent. The deleted footnote contained allegations of sexual harassment which petitioner later withdrew with prejudice.

which informed her that she had satisfactorily completed her probationary period and was a "permanent" employee, a requirement for all civil service employees, regardless of whether they have tenure (App A, pp 6, 15).

Dr. Kunsela retired in July 1982 and was succeeded by respondent, Dr. Peter Cayan (App A, p 6). Petitioner continued to work for respondent when she received written notice that she was to be dismissed effective October 19, 1984 (App A, p 6).

In her action claiming a deprivation of due process, petitioner alleged she had been discharged without a hearing or cause shown for her termination. After issue was joined, and prior to any discovery, petitioner and respondent moved for summary judgment. Both motions were denied (McCurn, D.J.). (See App D). The matter was reassigned to Judge McAvoy. After completion of discovery, respondent again moved for summary judgment. By memorandum-decision and order (App B, p 20), after consideration of the two letters upon which petitioner claimed a property right to employment, the District Court (McAvoy, D.J.) granted respondent's motion at 642 F Supp 947 and directed dismissal of the due process claim. By stipulation in September 1986 petitioner withdrew with prejudice all remaining claims, making the District Court's order final for purposes of appeal. 28 USC § 1291.

On petitioner's appeal the Court of Appeals (2 to 1) affirmed, holding that petitioner was not deprived of a property interest in continued employment, as a matter of law, and was lawfully terminated without a hearing and without a showing of "just cause". The court observed that under New York law, which would provide any property right that might exist, an employee with an indefinite term of employment is terminable at will unless there is a

limitation that refutes this presumption (App A, p 13). It then concluded (App A, pp 13-14) that the language of "permanent appointment" and "serves at the pleasure of the supervisor for the first two (2) years" in the letters confirming her employment falls well short of an express limitation on respondent's right to terminate petitioner at will.[2]

ARGUMENT

There is no basis for granting a writ of certiorari since the issue presented involves solely a question of applying state law to the particular facts of this case.

There is no reason warranting the grant of a writ of certiorari here. No federal question is presented for review, no conflict of authority exists among the circuits, nor is there any other reason for granting a writ of certiorari.

Petitioner claims a property right to her employment under state law (Pet, pp 18-22), asserting that she was denied due process because her employment was terminated without a hearing or a showing of cause. As the court below held, under state law, which is admittedly controlling here, *Cleveland Board of Education v Loudermill,* 470 US 532, 538 (1985); *Board of Regents v Roth,* 408 US 564, 577 (1972), petitioner's employment was terminable at will. She contests that state law determination, claiming it is not consistent with the decisions of the New York Court of Appeals in *Murphy v American Home*

[2]In view of the rationale of the decision, it was unnecessary for the Court to address respondent's contention that, in any event, the author of the subject letters had no authority to change the statutory classification of the secretary's position as an "exempt" position, which is a position terminable at will, to a tenured position. We remain of the view that our position in this respect provides an independent basis supporting the decision below.

Products Corp., 58 NY2d 293, 304-305 (1983), and *Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 466 (1982) (Pet, pp 10-22). Aside from its lack of merit, which we discuss below, the issue sought to be reviewed in this Court is limited to an interpretation and application of state employment law.

Petitioner concedes (Pet, pp 10-13) the principle of state employment law utilized by the court below, to wit, that an employee is terminable at will unless there is a limitation which refutes this presumption. Petitioner contends only that these principles were wrongly applied to the particular facts of her case.

Thus, the issue sought to be reviewed is limited to the unique facts of petitioner's claim. It is unlikely to occur with any regularity. Petitioner does not even allege that other individuals had the same protections or were similarly situated to petitioner (App A, p 23). While admittedly significant to petitioner, it is of little importance to the general public. There is no reason to review such an individualized case in which the sole issue is the proper application of state law.[3]

As we have noted, where the duration of an employment contract is not explicitly set forth under New York state law, the employment is presumed to be at will unless an express limitation on the right to terminate the employment is established.[4] *Quinn v Syracuse Model Neighborhood Corp.*, 613 F2d 438, 448 (2d Cir 1980); *Murphy v*

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[3]As the issue for review is solely an interpretation of state law in the Second Circuit, it clearly does not present a matter which would be in direct conflict with the decision of another Court of Appeals.

[4]Petitioner also asserts that such a limitation may be implied from the "totality of the circumstances". While the Court of Appeals did not find this to be the state law, it applied this analysis too and still did not reach the conclusion petitioner urges herein.

American Home Products Corp., 58 NY2d 293, 304-305 (1983); *see also, Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 466 (1982). Under New York law, a "contract" must specifically provide for discharge only upon "good cause" to establish a property right as to which due process protections are required. *Stein v Board of Education of City of New York*, 792 F2d 13 (2d Cir), *cert denied*, ____ US ____, 107 S Ct 572 (1986). The letters asserted by petitioner to be such a limitation on respondent's right to terminate at will, as both courts below found, do not state that petitioner could only be terminated "for cause", do not refer to applicable procedural protections of state law, and do not refer to any similar protections or procedures. The court below correctly found that petitioner's subjective interpretation, or unilateral expectation, did not establish a property right in continued employment and summary judgment was properly granted to respondent.[5]

There are no other special or important reasons for issuance of the writ. The writ should be denied.[6]

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[5]The dissenting opinion (App A, pp 25-30) would have remanded for a trial as to whether plaintiff's subjective interpretation was an actual "bargained for" term of employment. Yet after discovery, petitioner failed to uncover or present any evidence in support of this contention. This Court has recently emphasized that summary judgment is not disfavored and should be construed with due regard to the rights of defendants to show, prior to trial, that a person's claims have no factual basis. Where there is " 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial," summary judgment should be granted. *Celotex Corp. v Catrett*, ____ US ____, 106 S Ct 2548, 2553 (1986); *see Anderson v Liberty Lobby, Inc.*, ____ US ____, 106 S Ct 2505 (1986).

[6]Petitioner's second ground for review, that the court departed from the accepted and usual course of judicial proceedings by failing to reinstate the District Court's (McCurn, D.J.) pre-discovery order (Pet, pp 22-24), mischaracterizes the prior order, incorrectly assumes that respondent has the burden to disprove petitioner's claim, and er-

(Footnote continued on following page.)

CONCLUSION

The writ should be denied.

Dated: Albany, New York
August 26, 1987

Respectfully submitted,

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(Footnote continued.)

roneously states that respondent, after receiving a favorable determination on the merits, had to file an appeal from an earlier moot order. In any event, a Court of Appeals may affirm a District Court's "correct" decision, even if the lower court relied on a different or mistaken reasoning. *New York State Ass'n for Retarded Children, Inc. v Carey*, 596 F2d 27, 38 (2d Cir), *cert denied*, 444 US 836 (1979); *Lum Wan v Esperdy*, 321 F2d 123, 125-26 (2d Cir 1963).

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